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U.S. SENATE REPUBLICAN POLICY COMMITTEE

## Legislative Notice

No. 9

April 20, 2009

# **S. 386—Fraud Enforcement and Recovery Act of 2009**

Calendar No. 28

*S. 386 was reported by the Judiciary Committee, with an amendment in the nature of a substitute, by voice vote on March 5, 2009. S. Rpt. 111-10.*

### **Noteworthy**

- Cloture was filed on the motion to proceed to S. 386, the Fraud Enforcement and Recovery Act of 2009, on April 3, 2009. A cloture vote on the motion to proceed may occur early this week.
- The bill amends the federal criminal fraud statute to specifically include “mortgage lending business,” as defined by the bill.
- The bill expands the scope of money laundering crimes to cover all of the proceeds of illegal activity (i.e., gross receipts), not just the profits.
- The bill authorizes federal funds for various federal agencies and departments to increase mortgage, security and financial fraud investigations and prosecutions.
- The bill amends the False Claims Act to address recent court decisions narrowing its reach and to modernize the legislative provisions.
- The cost of the bill is estimated to be \$490 million over fiscal years (FYs) 2010 to 2014.
- The Administration has released an official Statement of Administration Policy (SAP) indicating strong support for the bill.

## **Background**

Mortgage fraud is generally defined as a material misstatement, misrepresentation, or omission that is relied upon by a lender to fund, purchase or insure a loan. Although mortgage fraud can come in many different schemes and forms, it is usually classified as either fraud for housing or fraud for profit.

Fraud for housing involves the borrower making misrepresentations, usually regarding income, personal debt or property value in order to secure a loan. According to the Federal Bureau of Investigation (FBI), fraud for housing accounts for 20 percent of all mortgage fraud.<sup>1</sup>

Fraud for profit involves complex transactions by industry professionals in the real estate, appraisal and banking businesses to extract money from financial institutions or borrowers. The Mortgage Asset Research Institute (MARI)<sup>2</sup> indicates that fraud for profit participants “skim equity; overstate income, assets, or collateral value; steal identities to secure or transact loans; overstate appraisal values for the purposes of selling the property multiple times; and invent fictitious properties and buyers to secure loans.”<sup>3</sup>

The FBI, in cooperation with other parts of the Department of Justice and other federal departments and agencies, has increased efforts to investigate and prosecute instances of mortgage fraud. FBI statistics indicate that there were more than 63,000 total mortgage fraud suspicious activity reports (SARs) in 2008 and almost 29,000 so far in 2009, and SARs do not represent a complete picture of the problem. To combat these issues, the FBI created 56 mortgage fraud task forces and working groups, including a National Mortgage Fraud Team (December 2008).<sup>4</sup> To date, the FBI has over 2000 pending mortgage fraud investigations. Total annual losses from mortgage fraud are estimated to be more than \$4 billion.<sup>5</sup>

S. 386 seeks to address fraudulent mortgage practices through a package of changes to current criminal fraud statutes, increased authorization levels for relevant law enforcement entities in the federal government and improved means to recover government funds via the False Claims Act. It is disputable whether the anti-fraud enhancements complement or duplicate existing provisions of federal law, including mail and wire fraud statutes, used to pursue these practices today. The redundancy argument was recently raised in a lengthy joint letter by the Heritage Foundation and National Association of Criminal Defense Lawyers.

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<sup>1</sup> See <http://www.fbi.gov/page2/dec05/operationquickflip121405.htm>

<sup>2</sup> A subscription based product owned by Choicepoint, Inc.

<sup>3</sup> See <http://www.marisolutions.com/mortgage-fraud.asp>

<sup>4</sup> See [http://www.fbi.gov/hq/mortgage\\_fraud.htm](http://www.fbi.gov/hq/mortgage_fraud.htm)

<sup>5</sup> The FBI cites the Prieston Group for this data point.

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## Legislative History

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S. 386 was introduced by Senators Leahy and Grassley on February 5, 2009, and referred to the Senate Judiciary Committee. The bill was reported, as amended, by that committee on March 5, 2009, by a voice vote, and subsequently placed on the Senate Calendar. Senator Coburn indicated a no vote during the committee's consideration.

Section 4 of S. 386 incorporates a number of very similar provisions to S. 2041 from the 110<sup>th</sup> Congress. That bill was introduced on September 12, 2007, referred to the Committee on the Judiciary, and subsequently reported, as amended, by the committee to the full Senate. No further action was taken on the bill.

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## Bill Provisions

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**Section 1.** Creates the short title of the bill.

**Section 2.** Expands the definition of financial institution in the federal criminal fraud statute (Title 18) to explicitly include “mortgage lending business.” The section also amends the False Statements in Mortgage Applications statute to cover mortgage lending businesses affecting interstate or foreign commerce or involving federally related mortgage loans. It also amends the criminal fraud statute to specifically reference economic assistance and Troubled Asset Relief Program funds and amends the securities fraud statute to include commodity futures fraud.

Section 2 amends federal money laundering statutes to undo a recent U.S. Supreme Court decision<sup>6</sup> that limited the proceeds of the illegal activity to only include profits from the illegal activity. Instead, section 2 would expand the scope of proceeds to cover any property derived from or obtained or retained, directly or indirectly, through the unlawful activity, including the gross receipts of the activity.

Lastly, the section amends the federal international money laundering statute to create a new money laundering crime to cover moving money from or through the United States with the intent to engage in tax evasion. This amendment changes the previous understanding of the crime of money laundering, which has focused on punishing financial transactions designed to launder the proceeds of criminal activity. Under S. 386, the act of tax evasion itself—without the need or any subsequent financial transaction—would be treated as “money laundering.” Thus, tax evasion would be punishable both under the tax code (which treats it a felony), and under the federal money laundering statute, which carries far greater penalties (20 years imprisonment and \$500,000 fine, versus five years and \$100,000).

**Section 3.** Specifically designated for mortgage, securities and financial fraud investigations and prosecutions, section 3 authorizes \$165 million for both FY 2010 and FY 2011 to be allocated as follows: \$75 million for the Federal Bureau of Investigation; \$50 million for U.S. Attorney's

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<sup>6</sup> *United States v. Santos*, 128 S. Ct. 2020 (2008).

offices; \$20 million for the criminal division of the Department of Justice; \$15 million for the civil division of the Department of Justice; and \$5 million for the tax division of the U.S. Department of Justice. In addition, section 3 authorizes \$30 million for both FY 2010 and FY 2011 for the U.S. Postal Inspection Service; \$30 million for both FY 2010 and FY 2011 for the Department of Housing and Urban Development; and \$20 million for both FY 2010 and FY 2011 for the United States Secret Service.

**Section 4.** Amends the False Claims Act (FCA) to overturn a number of recent court decisions that have narrowed its reach.<sup>7</sup> In particular, section 4 amends the FCA in order to clarify that (1) liability attaches for fraud perpetrated against contractors and grantees of the U.S. government—not just for fraud directly committed against the U.S. government; (2) intent is not necessary for FCA liability to attach; (3) the scope of FCA applies to funds administered by the U.S. government; (4) conspiring liability can arise from any violation of the FCA; (5) a valid receipt from the U.S. government is not necessary to attach liability; and (6) liability exists for conduct to conceal, avoid or decrease an obligation owed to U.S. government. The section makes clear that liability does not apply to federal employment compensation or income subsidies, such as Social Security benefits.

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## **Cost**

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The Congressional Budget Office (CBO) estimates that S. 386 would cost \$490 million over FYs 2010 to 2014, with the bulk of the outlays (\$411 million, or 92 percent) occurring in FY 2010 and FY 2011. CBO also estimates that civil and criminal recoveries for fraud will increase as a result of the bill.

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## **Administration Position**

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The Administration released an official Statement of Administration Policy (SAP) indicating strong support for the bill.<sup>8</sup>

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<sup>7</sup> Among others, see *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), and *United States ex. rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

<sup>8</sup> [http://www.whitehouse.gov/omb/assets/sap\\_111/saps386s\\_20090420.pdf](http://www.whitehouse.gov/omb/assets/sap_111/saps386s_20090420.pdf)